ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
	)	
For Construction Permit for an FM Broadcast Station	)	
	)	
	)	
Biltmore Forest, North Carolina	)	
	)	
To: The Commission	)	

RESPONSE TO SUPPLEMENTAL BRIEF

Respectfully submitted,

WILLSYR COMMUNICATIONS,
LIMITED PARTNERSHIP

Stephen T. Yelverton, Esq.
601 Thirteenth St., N.W.,
Suite 500 North
Washington, D.C. 20005
Tel: (202) 329-4200

January 7, 2000

RESPONSE TO SUPPLEMENTAL BRIEF

Willsyr Communications, Limited Partnership ("Willsyr"), by its counsel, pursuant to Order, FCC 99I-23, rel. November 23, 1999, responds to the "Supplemental Brief," filed by Liberty Productions, a Limited Partnership ("Liberty"), on December 23, 1999. Liberty's brief, which urges the reversal of its disqualification, must be rejected. It is not supported by substantial or reliable evidence and does not rely upon applicable law.

The Testimony of Liberty's Witnesses Supports its Disqualification

The testimony of Valerie Klemmer, Liberty's General Partner, and Tim Warner, her trusted friend and tower site advisor (Tr. 658, 716, 726, 734, 741, 744-745, 751-754, 769, 812-813, 818, 872, 972), provides more than ample "substantial evidence" to support the disqualification of Liberty under the specified tower site misrepresentation issue.

Klemmer's and Warner's testimony demonstrates that "reasonable assurance" of the availability of the tower site specified in Liberty's application was never obtained. Klemmer told the tower site owner, Vicky Utter, that she "might" be interested in obtaining the site. They merely discussed the "possibility" of such use and what "might" be available (Tr. 652, 655, 811, 872). Klemmer would get back to Utter only if she was the successful applicant and then discuss a tower site agreement (Tr. 661, 666).

According to Klemmer, no specific tower site was identified or amount of needed space specified. Warner and Utter only spoke in general terms about a tower location (Tr. 663, 811-814). Klemmer

acknowledged that she had no actual discussion with Utter as to a lease and there was never any discussion with Utter as to the number of years for a tower site agreement or whether payments would be monthly or yearly (Tr. 660, 810, 873-874, 890-891, 963).

The geographic coordinates for the property were not obtained by Liberty from Utter, but from Warner (Tr. 664-665, 814, 901-902). Klemmer did not tell Utter that Liberty would be specifying her property as its tower site in an FCC application, nor ask her permission to do so (Tr. 966). She did not ask Utter to inform her if the property was later sold or leased (Tr. 682).

Warner acknowledged that the tower site "commitment" he believed that Utter gave to Liberty was only inferred by him from snippets of various statements made by her. There was no one statement where Utter gave a commitment (Tr. 961). Warner has no recollection of the exact words she used (Tr. 889, 894).

Prior to Klemmer meeting with Utter, Warner had determined that he wanted Liberty to specify Utter's property in its application (Tr. 957). No meetings with other property owners had been arranged (Tr. 676).

Line-of-sight and shadowing is a serious problem in locating a tower site in the Biltmore Forest area (Tr. 835-836). Restrictive land covenants are another problem (Tr. 840-845, 849-850). The Utter property was one of the few feasible sites for the Biltmore Forest allocation (Tr. 840-845, 849-850, 957).

On August 21, 1987, some four days <u>prior</u> to the meeting that Klemmer and Warner had with Utter (Tr. 676, 685), a competing

applicant for the Biltmore Forest allocation executed a tower site lease with Utter for a large section of her property. It was the highest and best part of her property for use as a tower site. The lease had a minimum three-year term at up to $4,000 per year. Payment of $1,500 was made to Utter upon execution. This lease went into effect on August 21, 1987, and was recorded in the local courthouse on that same day (Orion Ex. 4; Tr. 944, 2475).

Klemmer's husband, Robert Dungan, was a practicing attorney who handled real estate transactions and thus would spend time in the local courthouse (Tr. 695, 761). He took an active interest in the affairs of Liberty (Tr. 702-709, 717, 726-727, 729-730, 735-736, 743-744, 758-759, 761, 769, 785, 800-801, 807, 816-817).

Warner, as an engineer for a local broadcast station, routinely researched the courthouse records with respect to tower sites in the area and routinely visited the Utter property (Tr. 682, 834, 837-850, 943-944). Klemmer expected Warner to be aware as to any lease or sale of the Utter property because he was personally acquainted with Utter and was very knowledgeable as to her property (Tr. 682-683). Klemmer and Warner knew that other prospective Biltmore Forest applicants were very interested in using the Utter property for a tower site (Tr. 655, 871, 883).

Liberty's application was filed on August 31, 1987, and the geographic coordinates for its proposed tower site, which Warner provided, were precisely plotted to be as far as possible from the section that Utter had leased on August 21, 1987, yet still be within the boundaries of Utter's property and not conflict with an

existing television tower located on Utter's property (Tr. 881-883, 901-903, 930, 946-948, 950, 956, 958-960, 978-980). The leased section is the highest and best part of Utter's property to use for a tower site (Liberty Ex. 11; Tr. 980, 2454, 2458, 2481).

According to Warner, in order to use the Utter property as a tower site, it would be necessary to coordinate with the lessee of an existing television tower located on that property. Liberty never contacted this lessee (Tr. 881-882).

Klemmer fully understood the FCC legal definition of "reasonable assurance" of the availability of a tower site (Tr. 652-653, 672, 680, 872-873). Warner also fully understood this legal definition (Tr. 825-829, 872-873, 875, 900, 906, 952, 976).

FCC Policy Requires the Disqualification of Liberty

Pursuant to National Innovative Programming Network of the East Coast, 63 RR2d 1534, 1539 (1987), an applicant must have some indication of the tower site owner's favorable disposition toward making an arrangement beyond simply a "mere possibility." Dutchess Communications Corp., 58 RR2d 381, 389 (Rev. Bd. 1985), holds that an applicant cannot merely have vague discussions with a tower site owner, negotiate no bona fide arrangement, and earnestly represent that it has "reasonable assurance" of that tower site. Some "firm" understanding is required.

The touchstone for "reasonable assurance" is the tower site owner's express approval of the tower site specification in the application. Cuban-American, Ltd., 63 RR2d 1118, 1126 (Rev. Bd. 1987). There must be a "meeting of the minds" between the tower

site owner and the applicant. Merely, a favorable attitude on the part of the tower site owner, standing alone, is insufficient. Even if a tower site owner would "favorably consider" use of his property and would at a future date commence "negotiations for finalizing arrangements," this is insufficient. Lee Optical and Assoc. Cos. Retirement and Pension Fund Trust, 63 RR2d 1589, 1603 (Rev. Bd. 1987).

An applicant cannot "think" that it has "reasonable assurance" of the tower site. There must be more than a "vague willingness to deal." A misunderstanding by the applicant as to the tower site owner's intentions does not constitute "reasonable assurance." Houston Family Television, 58 RR2d 1557, 1559 (Rev. Bd. 1985).

The mere "possibility" that a tower site will be available will not suffice, even where the owner indicates that he "could foresee no problem" in locating the tower on his land. William and Ann Wallace, 32 RR2d 105 (Rev. Bd. 1974). A tower site will not be considered available even where the owner indicates a "willingness to discuss" an arrangement. El Camino Broadcasting, 12 RR2d 720 (Rev. Bd. 1968).

Accordingly, based upon the testimony of Klemmer and Warner and applicable FCC policy, Liberty did not have "reasonable assurance" of the tower site that it specified in its August 31, 1987, application. Klemmer and Warner had only one vague discussion with Utter on or about August 25, 1987, which was only of a few minutes duration. This discussion was merely about "possibilities" of an arrangement sometime in the future.

Warner acknowledged that the "commitment" he believed Utter had given to Klemmer was only based upon snippets of conversations. There was no one statement by Utter giving assurance of a tower site. He does not remember her exact words.

Because Klemmer and Warner, who was her tower site advisor and agent, fully understood the FCC legal definition of "reasonable assurance," yet nevertheless specified a tower site in Liberty's application that they knew or should have known that Liberty did not have "reasonable assurance," a finding and conclusion of misrepresentation must be made.

The motive of Liberty and Klemmer to deceive in falsely certifying to the Utter property is readily apparent. Liberty needed to specify a tower site in its application to be filed on August 31, 1987. Klemmer relied upon Warner to find a tower site. Utter's property was one of the few tower sites that was technically feasible for the Biltmore Forest allocation and Warner was very knowledgeable about that property. No other property owners had been contacted by Klemmer or Warner.

Thus, in view of the filing deadline that was only several days away, Liberty had no realistic choice but to specify the Utter property. At the meeting with Utter, Klemmer and Warner avoided saying anything that might elicit a firm or definite denial from her as to use of the property. Therefore, they couched their conversation with Utter in as vague and general terms as possible.

Because the tower site lease that Utter entered into was a public record in the local courthouse on August 21, 1987, Klemmer

either knew or reasonably should have known of it. She was a local resident. Her husband was a practicing attorney who handled real estate transactions and thus would be in the courthouse. At that time, he was taking an active interest in the affairs of Liberty.

Klemmer, moreover, relied on Warner to be knowledgeable about the Utter property as to any sale or lease. Warner routinely researched land records in the local courthouse as to tower sites in the area and routinely visited the Utter property.

Warner's knowledge of the August 21, 1987, lease can be readily inferred. He provided the geographic coordinates for the site specified in Liberty's August 31, 1987, application. These coordinates were precisely plotted to be on Utter's property, but to be as far as possible from the section of land she had leased.

The leased section of Utter's property is the highest and best part of her property to use for a new tower. Warner would have had no reason to attempt to avoid specifying this prime part of Utter's property unless he knew about the August 21, 1987, lease.

Warner's knowledge of the August 21, 1987, lease must be imputed to Liberty and Klemmer. He acted as Liberty's agent in obtaining a tower site and Klemmer relied upon him to keep her informed as to any matters involving the Utter property.

With knowledge of the Utter lease of August 21, 1987, Liberty could not have made a "good faith" tower site certification in its August 31, 1987, application. Because Utter had leased a section of her property for a tower site to a competing applicant for an immediate payment of $1,500, Klemmer could have no reasonable basis

to believe that Utter had given her assurance for a similar tower site for no monetary consideration. Therefore, with no reasonable basis for the tower site certification, a finding and conclusion of misrepresentation must be made against Liberty.

The Arguments in Liberty's Brief Must be Rejected

Liberty, in its brief at paras. 6-7, 33, n. 13, attempts to portray Klemmer as a "credible and reliable" witness and Warner as a "disinterested" witness. However, Klemmer's testimony is self-serving and corroborated only by Warner. He is hardly a "disinterested" witness. Klemmer relied upon Warner to obtain assurance of a tower site from Utter and he acted as Liberty's agent and consultant in tower site and other application matters (Tr. 658, 716, 726, 734, 741, 744-745, 751-754, 769, 812-813, 818, 872, 972). Accordingly, the ALJ properly gave the testimony of these two witnesses very little credibility or weight, other than admissions against their interests.

Liberty, in its brief at paras. 8-15, attacks the credibility and reliability of Utter's testimony. However, the decisionally significant aspect of Utter's testimony --- that she did not give Liberty, Klemmer, or Warner any assurance of the use of her property for a tower site --- is corroborated by a contemporaneous written record. This is the August 21, 1987, lease which she executed and which was recorded that same day in the local courthouse (Orion Ex. 4).

It is simply implausible that Utter would lease a section of her property to a well-known local family for use as a tower site,

with an immediate payment of $1,500 (Orion Ex. 4; Tr. 940), and some 4 days later give assurance for use of a similar tower site to a stranger based upon one brief meeting of only a few minutes and demand no monetary consideration. Liberty asks the Commission to accept a scenario that is not worthy of belief.

Liberty's attack on Utter's credibility must be rejected on another basis. Warner, who is portrayed as "disinterested" by Liberty, acknowledged that Utter is trustworthy, reliable, honest, and is not a "liar." (Tr. 660, 681, 886-889, 894-896, 900, 905).

Liberty, in its brief at n. 8, attacks Utter's credibility because she did not appear at the hearing. However, at the hearing, Liberty stated that it was "happy" with Utter's deposition testimony in lieu of her live testimony (Tr. 1066). Therefore, Liberty has waived its rights in this respect.

Liberty, in its brief at n. 8, attacks the ALJ because of purported ex parte communications with Utter. However, these communications were solely procedural matters with respect to obtaining Utter's live testimony. There was no discussion as to what her testimony would be (Tr. 650, 1067-1068).

Liberty, in its brief at para. 6, n. 3, and para. 13, attempts to use the testimony of Brian Lee to bolster the testimony of Klemmer and Warner. Lee is a principal of the competing applicant that entered into the August 21, 1987, lease with Utter.

Liberty misstates Lee's testimony. Lee stated that Utter told him that while she was willing to enter into a lease agreement with others, such as Klemmer, she expected to be paid in the same manner

as Lee had done. All were to be treated the same (Tr. 2501).

Liberty, in its brief at paras. 2-5, attacks the ALJ for prejudging, prior to the hearing, the issues specified against it. However, Liberty's attack is unwarranted. The comments of the ALJ which Liberty complains were made in the orders specifying the issues and denying a tower site amendment. When an ALJ renders an order, he is not expected to be neutral or not take a position as to the issues.

Liberty, in its brief at para. 15, urges the Commission to make a de novo review of the record based upon Liberty Exs. 6-8. However, these exhibits were only admitted for purposes of official notice. Liberty did not object to their limited use (Tr. 634-636). Therefore, the exhibits cannot be used to establish the truth as to any matters.

WHEREFORE, in viewing of the foregoing, Liberty must be disqualified for misrepresentation and lack of candor as to its tower site certification, which was wholly insincere and not made in "good faith."

Respectfully submitted,

WILLSYR COMMUNICATIONS, LIMITED PARTNERSHIP

By: _____

Stephen T. Yelverton, Esq.
601 Thirteenth St., N.W., Suite 500 North
Washington, D.C. 20005
Tel. 202-329-4200

January 7, 2000

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney at law, do hereby certify that on this 7th day of January, 2000, I have caused to be hand-delivered or mailed, U.S. Mail, first-class, postage prepaid, a copy of the foregoing "Response to Supplemental Brief" to the following:

John I. Riffer, Esq.*
Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

James Shook, Esq.*
Enforcement Bureau
Federal Communications Commission
Washington, D.C. 20554

Timothy K. Brady, Esq.
P.O. Box 71309
Newman, GA 30271-1309

Lee Peltzman, Esq.
Shainis & Peltzman
1901 L St., N.W., Suite 290
Washington, D.C. 20036-3506

Donald J. Evans, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Ave., N.W., Suite 750
Washington, D.C. 20005

Stephen T. Yelverton

* Hand Delivery